

BEFORE THE
MARYLAND STATE BOARD OF CONTRACT APPEALS

Appeal of MARYLAND NEW)
DIRECTIONS, INC.)
) Docket No. MSBCA 1367
Under Department of Public)
Safety & Correctional)
Services RFP No. 8801-05)

June 9, 1988

APPEARANCE FOR APPELLANT: None

APPEARANCE FOR RESPONDENT: Alan Eason, Esq.
 Assistant Attorney General
 Baltimore, MD

Appeals Board - Jurisdiction - While the Appeals Board's jurisdiction rests upon an appeal being taken timely, it will still assume jurisdiction of an apparent untimely appeal where the procurement officer's final decision contains a prejudicially defective notice of Appellant's rights of appeal and the decision is otherwise proper in all respects since such a decision should not be considered a final decision for purposes of measuring the timeliness of an appeal.

Competitive Negotiation - Technical Proposal Evaluation - The Appeals Board's function in a competitive negotiation procurement is not to evaluate proposals in order to determine which should have been selected for award but to determine whether the competitive negotiations were fairly conducted in an equitable manner consistent with the requirements of the Maryland procurement law. The Board will not disturb an agency's determination regarding an evaluation and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of the procurement statute or regulations.

Competitive Negotiation - Responsibility Determination - Where the services to be provided under the proposed contract are personal services rather than corporate services, it is reasonable for evaluators to look at those employees who will perform the service to help establish that the offeror meets the minimum qualifications for the responsibility determination. The underlying analysis necessary for a determination of responsibility requires an evaluation of an offeror's capability as a firm, considered as a whole, which includes consideration of its employees and their capabilities.

Appeals Board - Jurisdiction - Where Appellant believes that the State's appropriations are not being spent as the Legislature intended or otherwise believes a public official's or administrative agency's actions are illegal or ultra vires and may injuriously affect the Appellant's rights, it properly should seek equitable relief in the Circuit Court, not

the Appeals Board, to restrain such action.

Competitive Negotiation - Evaluators - Conflict of Interest - Where an apparent conflict of interest exists for a member of the evaluation panel who is also named as a reference by one of the offerors, the Appellant has the burden of proving that there has been actual bias because of the conflict. Bias will not be attributed to procurement officials based on mere inference or supposition.

OPINION BY MR. LEVY

This is an appeal of a procurement officer's final decision denying Appellant's protest of the award of the contract in this negotiated procurement. Appellant basically argues that its proposal was not properly evaluated while the Department of Correction (DOC) maintains that it was. Since neither party requested a hearing, this opinion is based on the written record.

Findings of Fact

1. The Maryland Department of Public Safety and Correctional Services, Division of Correction (DOC) initiated a competitive negotiated procurement by issuing a request for proposals (RFP) dated September 8, 1987. This was a procurement for reintegration counseling services for female inmates about to be released from the Maryland Correctional Institution For Women, Jessup, MD. Proposals were due on October 1, 1987.
2. Proposals were received from the following three providers:
 - A. Maryland New Directions, Inc. (MND) (Appellant)
 - B. S.T.A.R. Associates, Inc. (S.T.A.R.)
 - C. Community Services of Maryland, Inc. (CSM)

3. A three member evaluation committee was appointed by the Commissioner of Correction consisting of Sharon Johnson, Warden, Maryland Correctional Institution - Women (MCIW); Deborah Tobin, Chief of Case Management, Department of Correction; and Barbara Shaw, Unit Manager, Pre-Release Unit for Women (PRUW).

4. The RFP provided for the following evaluation criteria (Agency Report, Exhibit A, p.7):

- a. Financial Proposal 40%
- b. Technical Proposal 30%
- c. Offeror Qualifications 30%

The evaluators were to score the technical proposals and the offeror qualifications without knowledge of the financial proposals. The procurement officer, Myles Carpeneto, was to evaluate the financial proposals.

5. At their meeting the evaluation committee reviewed the technical proposals and determined that all offerors met the minimum experience requirements (RFP, Section III F). The technical proposals were then discussed and individually scored.¹

7. The evaluations, based on the average of the individual scores of Johnson, Tobin and Shaw, were as follows:

	<u>Technical Proposal Average Points (30 possible)</u>	<u>Offeror Qualifications Average Points (30 possible)</u>
Appellant	22.33	24.33
S.T.A.R.	16.67	27.33
CSM	26.33	21.67

Mr. Carpeneto's scoring of the financial proposals was as follows:

	<u>Price per inmate</u>	<u>Points Awarded (40 possible)</u>
Appellant	\$273.00	35.90
S.T.A.R.	253.21	38.70
CSM	245.00	40.00

¹At the meeting of the evaluation committee, Sharon Johnson sent a replacement, Faye Levine, Jessup Regional Social Work Supervisor. She briefed Johnson on the meeting and Johnson submitted her scores at a later date.

Total Scores were:

Appellant	82.56
S.T.A.R.	82.70
CSM	88.00

The procurement officer recommended to the Commissioner of Correction that the contract be awarded to CSM and he approved the recommendation on October 30, 1987.

7. Appellant was debriefed on November 16, 1987 and subsequently filed a protest on November 20, 1987. The protest raised the following issues:

1. The evaluation of the technical proposals was superficial and flawed.
 - a) Evaluators considered the style and not the content of the workshops.
 - b) Evaluators did not note any consideration of job search assistance for PRUW inmates.
2. The evaluation of offerors' qualifications was superficial and flawed.
 - a) Evaluators did not give sufficient weight to critical criteria including the offerors' expertise in women's programs and issues, and assumed an organizational capability of CSM based on the expertise of two individuals.
 - b) Evaluators overlooked or ignored statements about primary responsibility and experience of MND's staff and resource persons.
3. CSM's program is not consistent with legislative intent in appropriating FY '88 funds for this purpose.
4. An apparent conflict of interest exists for a member of the Evaluation Panel who is also cited as a reference for CSM.

Appellant attached a nine page narrative statement to support its reasons for protest.

8. The procurement officer issued his final decision on December 15, 1987 and it was received by Appellant on December 16. In response to the four items raised by Appellant, the procurement officer answered as follows:

1. The evaluators were appointed by Commissioner Hopkins and used their best honest judgement [sic] as to which technical proposal would best meet the needs of the Division; the fact

that your firm would have evaluated the proposals differently is not relevant. The evaluator's [sic] actions and decision do not violate the State's procurement laws. The fact that the evaluators did not place as much scoring emphasis on the PRUW Inmate Assistance program as your firm would have is also irrelevant. In the specifications, this program was mentioned in one sentence as compared to the one and a half pages devoted to the MCIW portion of the program.

2. The Procurement Officer, with the advice and concurrence of the evaluation committee, has made the evaluation that CSM through its primary trainers, one of whom is the Executive Director of the organization, is capable ". . . in all respects to perform fully the contract requirements and the integrity and reliability to assure good faith performance." This assessment was based on the materials submitted in CSM's technical proposal and interviews of CSM's various references.

The evaluators spent considerable time evaluating the proposals received and there was considerable discussion about MND's staff and resource persons. The evaluators think, though, that CSM will do a better job helping our women inmates reintegrate back into the community.

3. The authorization to expend funds appropriated by the Legislature is granted by the procurement control agency. In this case, the Department of Budget and Fiscal Planning (DBFP) did not find any inconsistency between the specifications and the budget language when DBFP reviewed and approved the solicitation before it was publicized.
4. The Board of Contract Appeals has ruled previously that even if an evaluator had previously worked for an offeror submitting a proposal, the evaluator does not have to be disqualified unless it can be proven that the evaluator will act improperly. The possibility of bias is not sufficient grounds for disqualification. The situation which MND presents as being a conflict is merely that an evaluator was cited as a reference, not even that she was a former employee. Were I to uphold MND's protest on this ground, I would open the Pandora's box of vendor influence in the selection of the evaluation committee; if a vendor did not want a particular person to be an evaluator, the vendor would simply use that person as a reference.

The procurement officer further advised Appellant that this was his final decision and that an appeal could be taken to this Board within 15 days from the date of receipt of the final decision.

9. DOC executed a contract with CSM on December 15, 1987 pursuant to COMAR 21.10.02.10B.² Appellant had been the incumbent provider.

10. Appellant filed its appeal with this Board on December 31, 1987. The stated reason for the appeal was as follows:

. . . the Division [DOC], in finding our protest without merit, did not respond to significant issues that we raised, and focused instead on those issues that were less subject to clear, objective decision-making.

Appellant specifically pointed to two examples. First, in its protest Appellant alleged CSM based 40% of its proposed training program on an out-dated curriculum designed for independent study. In response, the procurement officer only noted that DOC did not have to evaluate the proposals as Appellant would have. Appellant argues that it was not in the State's best interest to purchase services that are not current and not based on a thorough familiarity with the field or the population to be serviced. Second, it asserts there was no discussion of the issue of "primary trainer" responsibilities or job descriptions and that the procurement officer only responded that the information submitted by CSM was sufficient. Appellant alleges it

²COMAR 21.10.02.10 Awards of Contracts Pending Protests and Appeals.

B. If the authority to award a contract has been delegated to a department pursuant to COMAR 21.02.01.04, and a timely protest or appeal has been filed, the contract can be executed only if either the:

(1) Head of the procurement agency or that official's designee makes a determination that execution of the contract without delay is necessary to protect substantial State interests; or

(2) Appeals Board makes a final determination concerning the appeal. If a contract is to be executed pursuant to SB(1) of this regulation, the procurement agency shall notify the Appeals Board of its action and shall also advise the Board of Public Works by appropriate notation when the item is reported to the Board on the department's Procurement Agency Activity Report (PAAR).

was not credited with well documented and delineated information, while CSM was credited with information not even supplied. Accordingly, Appellant argues that it was evaluated on a different basis than that of other bidders.

11. Neither party requested a hearing of this appeal before the Board.

DECISION

The first issue that this Board must address is whether it has jurisdiction to hear this appeal. While neither party has raised the issue of the timeliness of this appeal, the Board on its own behalf takes notice that the procurement officer in his final decision of December 15, 1987 advised the Appellant that it had fifteen (15) days from the date of receipt of the decision to note an appeal with this Board. We further note that Appellant advised the Board in its December 31, 1987 letter of appeal that it received the procurement officer's final decision on December 16, 1987. Since the letter of appeal was filed with the Board on December 31, 1987 it was filed within fifteen (15) days of receipt of the procurement officer's final decision but more than ten (10) days after its receipt.

This Board has consistently held that its jurisdiction rests upon a timely appeal of a procurement officer's final decision and the Appellant's failure to file an appeal timely is appropriate reason to dismiss the appeal. Eastern Chemical Waste Systems, MSBCA 1310, 2 MICPEL ¶139 (1986); Cooper & Lybrand, MSBCA 1098, 1 MICPEL ¶37 (1983); Rolm Mid-Atlantic, MSBCA 1161, 1 MICPEL ¶64 (1983). The problem arises in the instant appeal because the procurement officer has made a mistake in his appeal notice to the Appellant which has caused the Appellant to make an untimely appeal.

The Maryland Legislature in 1986 amended the law, to be effective July 1, 1987 and now codified as §11-137(f)(1), State Finance and Procurement Article, Ann. Code of MD, 1987 Supp., as follows:

(f) Appeals to Board. - (1) A bidder or offeror, a prospective bidder or offeror, or a contractor may appeal the final action of a procurement agency to the Appeals Board:

(i) within 10 days after notice of a final action as to a protest regarding the formation of a contract and, in which case, the Appeals Board shall decide the case expeditiously giving it precedence over other matters before the Appeals Board; and

(ii) within 30 days after receiving notice of a final action relating to a contract that has been entered into. (Underscoring added)

However, the State has not made the necessary change in the appropriate procurement regulations, COMAR 21.10.02.08C(3) and COMAR 21.10.02.09A, which still provide for 15 days to file an appeal to this Board as follows:

21.10.02.08 C. The procurement officer shall furnish a copy of the decision to the protester and all interested parties, by certified mail, return receipt requested, or by any other method that provides evidence of receipt. The procurement officer shall include in the decision:

(1) A description of the controversy;

(2) A statement of the procurement officer's decision, with supporting material;

(3) A paragraph substantially as follows:

"This is the final decision of the procurement officer. This decision may be appealed to the Maryland State Board of Contract Appeals. If you decide to make such an appeal, you must file written notice of appeal to the Appeals Board within 15 days from the date you receive this decision." (Underscoring added)

21.10.02.09 A. Protesters are required to seek resolution of their complaints initially with the procurement agency. If a protest has been timely filed initially with the procurement agency, any subsequent appeal to the Appeals Board shall be filed within 15 days of receipt of notice of the final action. (Underscoring added)

Apparently the procurement officer relied on the incorrect regulations in the preparation of his final decision.

Established administrative law holds that power granted to an administrative agency to make rules and regulations extends no further than the

authority given by the relevant statutory delegation. Therefore, to the extent regulations are inconsistent or out of harmony with the statute being administered they must be deemed void. Kennedy Temporaries, MSBCA 1061, 1 MICPEL ¶21 (1982), *aff'd*, Case No. 108959 (Cir. Ct. Balto. City, Feb. 17, 1983), *rev'd* on other grounds 57 Md.App. 22 (1984). Since COMAR 21.10.02.08C(3) and COMAR 21.10.02.09A are void to the extent that they provide for 15 days notice rather than 10 days, the procurement officer's reliance on these regulations was improper. His final decision is therefore prejudicially defective to the extent that he gave Appellant an improper notice of its right of appeal.

Where there is such a defective notice in the final decision, it should not be considered a final decision for purposes of measuring the timeliness of an appeal. W.H. Moseley Company, ASBCA No. 27370-18, 83-1 BCA ¶16,272; Virginia Polytechnic Institute and State University, NASA BCA No. 1281-17, 82-2 BCA ¶16,072. However, while a failure to properly follow the format prescribed by a statute or a regulation may preclude the commencement of a statutory time limitation within which to initiate an appeal, the absence of, or incorrect use of, required language should not preclude this Board from treating an otherwise proper procurement officer's final decision as such and entertaining an appeal taken therefrom. Veeco, Inc., ASBCA 26993, 82-2 BCA ¶15,824. "The notice of rights in a final decision is for the benefit of the contractor, not the government. No useful purpose would be served by remanding this case for compliance with that formality. The requirement for a [procurement] officer's decision has been met in substance." Prime Roofing, Inc., ASBCA No. 25836, 82-1 BCA ¶15,667. See also, Habitech, Inc., ASBCA Nos. 26388, 26403, 26404, 26404, 82-1 BCA ¶15,794. Accordingly, we will assume jurisdiction of this appeal without the

necessity of remanding it to the procurement officer for necessary correction of the appeal notice in the final decision.

Turning then to the issues of this appeal, the Appellant in its protest to DOC filed on November 20, 1987 raised four basic issues.

1. The evaluation of the technical proposals was superficial and flawed.
2. The evaluation of the offerors' qualifications was superficial and flawed.
3. CSM's program is not consistent with legislative intent in appropriating FY '88 funds for this purpose.
4. An apparent conflict of interest exists for a member of the evaluation panel who is also cited as a reference for CSM.

The procurement officer answered each one of these issues in his December 15, 1987 final decision. In its appeal to this Board, Appellant appears only to be concerned with items one and two above. (Finding of Fact No. 10).

However, this is not clear. Therefore we will address all four issues raised in the initial protest.

Issues one and two deal with the process of evaluating proposals and offerors. We have dealt with these issues many times before. We recently enunciated the appropriate law in this area in AGS GENASYS Corporation, MSBCA 1325, 2 MICPEL ¶158, (1987) as follows:

The determination of the relative merits of proposals thus is the responsibility of the contracting agency and it must bear the burden of any difficulties incurred by reason of a defective evaluation. Since procuring officials enjoy a reasonable range of discretion in evaluating proposals and in determining which offeror or proposal is to be accepted for award, their determinations are entitled to great weight. In this regard, our function is not to evaluate proposals in order to determine which should have been selected for award as the most advantageous proposal, but to determine whether the competitive negotiations were fairly conducted in an equitable manner consistent with the requirements of Maryland procurement law. Accordingly, we will not disturb an agency's determinations regarding an evaluation

and selection of a successful offeror unless shown to be unreasonable, arbitrary, or in violation of procurement statutes or regulations. See: Tracor, Inc., supra [Comp. Gen. Dec., B-186315, November 8, 1976, 76-2 CPD ¶386] at 16.

In Appellant's argument for its first issue, it is protesting the high technical score given to CSM relative to that of Appellant because of two specific charges; i.e. (1) the evaluators considered the style and not the content of the workshops and (2) the evaluators did not note any considerations of job search assistance for inmates. More specifically Appellant argues that CSM's stated objectives and listed topics demonstrate a lack of knowledge of the topics they plan to cover and the population they are to serve; some of the materials CSM has chosen are out of date; CSM demonstrates a total lack of knowledge of teaching for long-term information retention; Appellant disagrees with the evaluators' determination that Appellant's workshops had no structure and that CSM's were easy to follow demonstrations; and several topics of significant concern to women about to be released from prison were included in Appellant's proposal but not in that of CSM, i.e. CSM does not offer separate drug and alcohol workshops, emergency and transitional housing, day emergency shelters or resource assistance. Appellant further argues that weight was not placed on the technical quality of its Prerelease Unit For Women job search assistance. It asserts CSM offers no community advocacy for employment of female ex-offenders and no targeted job development for specific clients.

The RFP is clear with regard to the scope of the contract. Attachment No. 2 of the RFP provides in pertinent part as follows:

A. WORKSHOPS

1. The Contractor shall conduct workshops for female inmates selected by the division who are scheduled for parole or mandatory release from the Maryland Correctional institution [sic] for Women (MCIW). The Contractor will conduct two 5 day workshops each month at

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MCIW. Approximately 12 inmates who are within six months of release will participate in each workshop.

2. A day is considered to be 6 hours long. Unless the Contractor and the Division otherwise agree, the workshops are to take place during normal working hours with the exact times being determined by the Division in consultation with the Contractor.
3. Each workshop shall cover topics including, but not limited to the following:
 - a. Problem Solving
 - b. Anger and Aggression
 - c. Legal Issues
 - d. Reintegrating with the Family
 - e. Utilizing Community Resources
 - f. Improvement of Self-Image
 - g. Setting Goals
 - h. Stress Management
 - i. Learning to Cope
 - j. Employment Readiness
4. The Contractor shall conduct the Employment Readiness portion of its workshop program in such a manner as to make it functionally equivalent to the Employment Readiness Workshop program conducted by the correctional education staff of the Maryland State Department of Education (MSDE). The MSDE Employment Readiness Workshop is a 16 hour program consisting of eight units with each unit having pre and post testing. The eight units are:
 - a. Effective job finding skills
 - b. How to plan your job search
 - c. Completing an employment application
 - d. Effective job interview skills
 - e. The job interview
 - f. Legal obligations and the rights of the ex-offender on the job
 - g. Decisions about money
 - h. Education and training
5. The Contractor shall prepare a written outline for each topic of the workshop program. This outline shall include the objectives for the topic as well as the methodologies and the time frames for accomplishing each objective. The Division reserves the right to review and suggest changes to the Contractor's proposed outlines except that, with regard to the Employment Readiness topic, the Division solely shall determine whether the Contractor's planned and provided Employment Readiness topic outline is functionally equivalent to the MSDE program.

The Appellant has the burden of proving that the evaluation process was unreasonable, arbitrary or in violation of the procurement statutes and regulations. We do not find that Appellant has met that burden with regard to the first issue. The Appellant has done no more than disagree with the evaluators' subjective judgment in the evaluation of CSM's proposal. Each of its allegations are no more than a challenge to the judgment of the evaluators. Appellant does not assert that CSM will not fulfill the program requirements outlined in the scope of the contract, but asserts that it will fulfill the RFP program requirements better and therefore it should have a higher technical score. DOC states in its agency report that CSM's curriculum was determined to be functionally equivalent to that set out in the RFP. Since Appellant raised no objection to the curriculum in the RFP prior to the opening of the proposals it cannot be heard to argue after the opening that the curriculum was improper. See: COMAR 21.10.02.03A.

In Appellant's argument for its second issue, that the evaluation of offerors' qualifications was superficial and flawed, it is protesting the minor variance in technical scores (2.6 points) even though Appellant was rated more qualified than CSM. This is based on two specific charges, (1) evaluators did not give sufficient weight to critical criteria including the Appellant's expertise in women's programs and issues, and assumed an organizational capability of CSM based on the expertise of two individuals, and (2) evaluators overlooked or ignored statements about primary responsibility and experience of Appellant's staff and resource persons. More specifically Appellant argues that the evaluators placed undue emphasis on the fact that CSM's proposal identified two primary trainers and Appellant did not identify who would lead the workshops; the evaluators did not consider the satisfaction of participants with workshops conducted by Appellant since 1985; that CSM is not minimally

qualified, using a reasonable person standard under the COMAR definition of a "responsible" offeror, because CSM, a provider of residential programs for mentally retarded adults, has no demonstrated experience in conducting programs in prison for women or programs fitting the scope of this procurement; CSM's experience rests with their two primary trainers while Appellant, on the other hand, is a nationally recognized leader in the provision of services to women in crisis and transition.

Only Appellant's assertion that CSM is not a responsible offeror requires extended discussion. With regard to the responsibility determination of offerors, the RFP provides the following in Section III:

F. MINIMUM QUALIFICATIONS

01. The procurement regulations in Title 21 of the Code of Maryland Regulations (COMAR) defines a "responsible" offeror as one "...who has the capability in all respects to perform fully the contract requirements...". For this solicitation, the Division shall not consider as "responsible" a vendor who does not meet the following qualifications:

The offeror must have worked with offenders in a prison setting and must have presented 2 workshop programs fitting the scope of responsibility specified in this solicitation on at least two previous occasions. These institutional programs must have been completed without disruption of the institutional routine.

* * * * *

03. Please note that the above stated qualifications are minimums and do not of themselves make an offeror "responsible"; however, an offeror cannot be considered "responsible" if the offeror does not meet the minimum qualifications. The determination as to whether an offeror is responsible is made based on the subjective judgement [sic] of the Procurement Officer about whether the offeror meets the definition of a "responsible" offeror.
04. The Procurement Officer will make a determination about whether an offeror is "responsible", including any determination as to whether an offer meets the minimum qualifications, only after proposals are

received but by the time that the contract is awarded.

Again, the Appellant has the burden of proving that the evaluation determination of CSM as a responsible offeror was unreasonable, arbitrary or in violation of the procurement statutes or regulations and again we do not find that Appellant has met that burden. Appellant's only substantive argument on this issue is that DOC assumed an organizational capability of CSM based on the expertise of two individuals and that CSM has no demonstrated experience in conducting programs in prison for women or programs fitting the scope of this procurement. Appellant does not allege that CSM is not an established organization with the ability to manage and run its business. Appellant, however, does dispute CSM's ability to perform in the area of expertise covered by the RFP. While the record before us is not extensive it does appear that CSM is a company that operates in several areas of community training and placement for disadvantaged people with the subject matter of this RFP being one of those areas. It apparently is not the exclusive area of its operation and probably it is not to the extent that Appellant has operated in this area. But it is clear that the CSM proposal demonstrates that CSM does operate in this area of expertise at least to the extent to satisfy the minimum definitive qualifications noted above. The designation of Donald Ford, CSM's Executive Director, and Marianna Burt, Esq. as the two primary trainers for this contract and their respective extensive resumes clearly demonstrates that the minimum qualifications are met. We believe, in this case particularly, it was reasonable for the procurement officer and the evaluators to look at the two primary trainers and their respective backgrounds to establish at least that CSM met the minimum qualifications because the nature of the services to be provided here are really personal services rather than corporate services. In The National Elevator

Company, MSBCA 1266, 2 MICPEL ¶124 (1986) we discussed the difference between a bidder's experience and that of its employees and how they are both related to the ultimate responsibility determination. We noted that the underlying analyses necessary to reach a determination of responsibility requires an evaluation of an offeror's capability as a firm, considered as a whole, which includes consideration of its employees and the capabilities of its employees. CSM's utilization of its two primary trainers' past experience to establish its corporate ability to meet the minimum qualifications here was reasonable. Appellant has not met its burden of showing that the evaluators acted unreasonably.

All of the other aspects of Appellant's argument on this issue are no more than a challenge to the judgment of the evaluators; its an attempt to substitute Appellant's subjective views for that of the evaluators'. Appellant has offered no evidence to support its assertions that even comes close to meeting its burden of proof.

The third issue raised by Appellant is that CSM's program is not consistent with the legislative intent in appropriating FY '88 funds for this purpose. In other words, Appellant questions whether DOC is spending this particular appropriation properly. There is no need to examine the specific appropriation involved to see how it compares to CSM's proposed program since Appellant's real argument on this issue [p.8-9 Appellant's Support for Protest] is no more than a statement that the State's money would be better invested if it were spent on Appellant's program rather than CSM's. This again is a challenge to the judgment of the evaluators and not an attack on an improper use of State funds. As we stated above we will not substitute our judgment for that of the procurement officer's. AGS GENASYS Corporation, supra. If Appellant truly believes that the State's money will not be

spent as the Legislature intended, it properly should seek its remedy in the Circuit Court since this is a matter for the equity courts. It is established law in this State that a taxpayer should seek equitable relief in the circuit courts to restrain the action of a public official or administrative agency where it believes such action is illegal or ultra vires and may injuriously affect the taxpayer's rights. McKaig v. Mayor and City Council of Cumberland, 208 MD 95 (1955); Dudley, Jr. v. State Roads Commission et al, 224 MD 613 (1961); Citizens Planning and Housing Association et al v. County Executive of Baltimore County et al, 273 MD 333, 338, 329 A.2d 681 (1975).

The final argument raised by Appellant is that an apparent conflict of interest exists for a member of the evaluation panel who is cited as a reference for CSM. More particularly, Sharon Johnson, one of the evaluators, was listed by CSM as a reference for one of its primary trainers. While we agree with Appellant's observation that "[a]lthough there is no specific prohibition in COMAR against this dual role, public officials must carefully avoid the appearance of conflict of interest," we must also note that Appellant has the burden of proving that there has been bias because of this possible conflict. As we stated in Baltimore Motor Coach Company, MSBCA 1216, 1 MICPEL ¶94 (1985):

This Board previously has ruled that bias will not be attributed to procurement officials based on inference or supposition. B. Paul Blaine Associates, Inc., MSBCA 1123, August 16, 1983, at p. 13. However difficult it may be to prove the subjective motivation of State procurement officials, an Appellant seeking to establish that its competitive position was affected by discriminatory actions nevertheless carries the burden.

Here again the Appellant has not met its burden of proof. The Appellant has offered no probative evidence showing that anything improper occurred during this procurement. There is no evidence that Johnson's previous or current contacts with CSM in any way affected the evaluation of the

proposals. Something more concrete than mere inferences of favoritism or improper influence as set forth here is required.

For the foregoing reasons, therefore, the appeal is denied.